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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

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R.A.V.,
*Petitioner*,
vs.
ST. PAUL, MINNESOTA,
*Respondent*.

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On Writ of Certiorari To The
Supreme Court of Minnesota

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# BRIEF FOR AMICI CURIAE LEAGUE OF MINNESOTA CITIES CITY OF MINNEAPOLIS CITY OF ST. PAUL IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

Should this court apply the overbreadth doctrine in reviewing a city ordinance when a state's highest court has placed a limiting construction on the ordinance to prevent it from applying to constitutionally protected activity?

May a city enact an ordinance to prohibit intentional conduct aimed at causing fear and intimidation of a person caused in part, and done, on the basis of race, color, creed, religion or gender?

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## INTEREST OF AMICI CURIAE

The League of Minnesota Cities has a membership of 802 out of the 856 cities of Minnesota and represents the common interests of those cities before the courts, as well as other governmental bodies. The City of Minneapolis is the largest city in Minnesota and has an ethnically diverse population in which bias-motivated crime exists. The City of St. Paul is the state's second largest city and the author of the ordinance which is under review before this court. Because this is a criminal proceeding, the City of St. Paul has never been a party to this action. The parties have consented to our participation in this case. The letters granting consent are on file with the clerk.

Our interest in this matter is public in nature. We support Respondent State of Minnesota's position that the ordinance is constitutional as it has been construed to apply by the Minnesota Supreme Court. Cities have the authority, and should be able, to prohibit intentional conduct aimed at causing fear and intimidation in another, especially when the act is done on the basis of race, color, creed, religion, or gender. A decision striking down this ordinance would call into question the constitutionality of disorderly conduct statutes in general, which is one of the most frequently charged crimes in these urban areas.

## SUMMARY OF THE ARGUMENT

1. Courts owe great deference to the legislative intent of a law's authors. The Minnesota Supreme Court gave the proper deference to that intent in interpreting the statute to be a constitutional prohibition against only fighting words and imminent lawless action, such as breaches of the peace and assaults. By applying the state court's limiting construction, no protected activity is prohibited. Nor is the ordinance unconstitutionally vague after its application has been limited. There is still sufficient guidance for a person to understand what acts are prohibited.

2. The St. Paul ordinance is a content neutral prohibition on actions which harm the city's residents. The ordinance prevents conduct which would otherwise be prohibited in a disorderly conduct statute. To the extent that the prohibited conduct constitutes expressive activity which is afforded some level of First Amendment protection, this ordinance constitutes a valid prohibition against activity which harms individuals in our society. There is a substantial government interest in preventing actions causing fear and intimidation to specific individuals. The state also has an important interest in protecting the privacy of individuals in their own homes and protecting them from unwanted confrontive speech. The scope of the ordinance is limited and narrowly tailored to prohibit only unprotected activity. A person may still express his unpopular viewpoints through other means of communication which are not directed at harming a specific individual.



## ARGUMENT

### ST. PAUL ORDINANCE SECTION 292.02 IS NOT OVERBROAD AND DOES NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

### 1. This Court Should Follow The Limiting Construction Placed On The Ordinance By The Minnesota Supreme Court And Find That The Ordinance As Applied, Is Not Unconstitutionally Overbroad.

A person whose speech or conduct is subject to legitimate prosecution is permitted by the overbreadth doctrine to challenge the constitutionality of a statute on its face on grounds the statute "also threatens others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). This unusual approach is designed to alleviate the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The overbreadth doctrine is "strong medicine," to be employed with hesitation, and then only as a last resort. *New York v. Ferber*, 458 U.S. 747, 769 (1982). The possibility that a statute might be misapplied or misused is insufficient for a facial challenge to succeed. *Members of City Council v. Taxpayers For Vincent*, 466 U.S. 789, 800 (1984). Only when there is a "realistic danger" that a challenged statute "will significantly compromise recognized First Amendment protections," *id.* at 801, may the law

be challenged on overbreadth grounds. In other words, the provision's existence, in and of itself, must threaten the unfettered expression of ideas. Section 292.02 no more inhibits free expression than traditional disorderly conduct statutes or ordinances.[1]

A statute must be substantially overbroad before a reviewing court can invoke the overbreadth doctrine. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This is particularly true when conduct and speech are joined, *id.*, as in the instant case. "If the overbreadth is 'substantial,' the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* In making this assessment, this court considers the actual text of the statute as well as any limiting constructions that have developed. *Kolender v. Lawson*, 461 U.S. 352, 355, (1983).

Section 292.02, like other breach of peace statutes, prohibits a "core of easily identifiable and constitutionally proscribable conduct." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 (1984). The risk that application of section 292.02 by police and prosecutors might penalize

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[1] For example, Minnesota's disorderly conduct statute, Minn. Stat. 609.72, states in pertinent part:

Whoever does any of the following in a public or private place, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of peace, is guilty of disorderly conduct, which is a misdemeanor.

(3) Engages in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment in others.

The constitutionality of section 609.72 (3) was upheld by the Minnesota Supreme Court in *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978).



protected expression is insignificant. Certainly, the facts here do not suggest otherwise: What could be more central to the concerns that prompted enactment of section 292.02 than the burning of a cross on the front lawn of a black family's home?

**A. The Minnesota Supreme Court's authoritative construction of section 292.02 eliminates the possibility of impermissible application and is binding on this court.**

It is the general practice of reviewing courts to interpret laws so as to avoid constitutional problems. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 483 (1988). The Minnesota Supreme Court interpreted section 292.02 in its decision below to apply to expressive conduct that is the functional equivalent of "fighting words," *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), and conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). *In the Matter of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991). The state court found the ordinance to be reasonably subject to an interpretation limiting its scope to conduct which is outside First Amendment protection. *Id.* The court reasoned that "resort to epithets or personal abuse, [however], is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument." *Id.* at 511 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)). "So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order." *Id.*

In limiting the application of the ordinance, the Minnesota

court recognized the fundamental governmental purpose behind section 292.02 and other breach of peace statutes -- to protect public safety and make possible the quiet enjoyment of communal life -- and ensured that the ordinance would not be used to restrict lawful political and social expression. This construction also follows the legislative intent of prohibiting only conduct which would cause fear and intimidation to a specific person.

A state court's construction of a state statute is binding on direct review by this Court. *New York v. Ferber*, 458 U.S. 747 769, n.24 (1982); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Smiley v. Kansas*, 196 U.S. 447, 455 (1905). This is equally true when a state court has construed a municipal ordinance, which in Minnesota has the force and effect of a statute within the enacting jurisdiction. There is no alternative for this Court but to weigh petitioner's challenges to section 292.02 in the context of the Minnesota Supreme Court's interpretation of the St. Paul ordinance. The circumstances here are thus markedly different than in *Gooding v. Wilson*, 405 U.S. 518, 524 (1972) (Georgia courts had not limited statute's application to fighting words), for example, or *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974) (state court contemplated a broader reading of city ordinance than would be permitted under fighting words doctrine).

**B. Section 292.02, as construed below, is not void for vagueness.**

A criminal prohibition is void for vagueness, and thus unenforceable, when its language is so ambiguous that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U. S. 385, 391 (1926). In First Amendment cases, the vagueness doctrine, like the concept of overbreadth, serves to avoid



the chilling of constitutionally prohibited expression, *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974), and to prevent selective enforcement of a penal statute against persons espousing unpopular ideas. *Kolendar v. Lawson*, 461 U.S. 352, 357-61 (1983).

Contrary to petitioner's assertions, limiting the reach of a statute to prohibit what the First Amendment does not protect is an entirely appropriate means of avoiding potential overbreadth challenges and does not automatically raise vagueness problems. This Court has accepted such an approach in past cases, *Colten v. Kentucky*, 407 U.S. 104, 111 (1972), and engaged in the practice itself, *Arnett v. Kennedy*, 416 U.S. 134, 162 (1974) (plurality opinion), without suggesting that it had substituted vagueness for overbreadth. In fact, this court has held that where conduct and not merely speech is involved, and a law is not substantially overbroad, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 614-16 (1973).

The terms employed by the Minnesota Supreme Court below are unobjectionable from a First Amendment perspective. As construed by the court, section 292.02 applies to expression that itself inflicts injury or tends to incite immediate violence, *Chaplinsky*, 315 U.S. at 572, as well as to conduct designed to incite or result in imminent lawlessness and likely to incite or cause such behavior, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

These terms are readily comprehensible. They afford fair notice of what is forbidden and provide sufficient guidance for officials charged with enforcing the ordinance. Greater precision is neither required nor feasible when the criminal law seeks to prohibit breaches of the peace.

Police departments throughout the United States have

extensive experience working with disorderly conduct statutes and ordinances. The likelihood of discriminatory enforcement of section 292.02 is no greater than when a more traditional prohibition of a disorderly conduct statute is employed. Ultimately, whether an accused can be prosecuted successfully under section 292.02 will depend on the threatened result of the defendant's actions as much as the actions themselves -- and on a jury's determination that the defendant acted unreasonably under the circumstances. There is nothing unusual or constitutionally improper about this. As Justice Holmes stated, "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct." *United States v. Nash*, 229 U.S. 373, 377 (1913).

**2. St. Paul Ordinance Section 292.02 Is A Permissive Restriction On Petitioner's Conduct, And Its Application Does Not Violate The First Amendment Of The United States Constitution.**

In any analysis involving the First Amendment, the threshold question is whether Petitioner's actions constitute expressive conduct, thereby invoking the First Amendment's protections. *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

Conduct may be sufficiently imbued with elements of communication so as to fall within the scope of the First Amendment. *Spence v. Washington*, 418 U.S. 405, 409 (1974). In determining whether particular conduct possesses sufficient communicative elements to invoke the First Amendment, the court must decide whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410-411.



This brief proceeds on a predicate that burning a cross may be conduct which possesses sufficient elements of communication to implicate the First Amendment in some cases. However, it is not necessarily true that the burning of this cross was protected First Amendment activity. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). It must be considered that, as construed, this ordinance prohibits only the type of conduct which would constitute disorderly conduct, and that Petitioner's actions fall within this scope.

The initial inquiry in determining whether this activity is protected by the First Amendment is whether the governmental interest in regulation is related to the suppression of free expression. *Texas v. Johnson*, 491 U.S. 397, 403 (1989). If the interest is related to the suppression of expression, we must apply a heightened standard of review. *Id.* If the interest is unrelated to the suppression of expression, the more deferential standard enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), will apply. *Id.* When speech and nonspeech elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *O'Brien*, 391 U.S. at 376. Such a regulation is sufficiently justified, despite its incidental impact upon First Amendment interests: 1) if it is within the constitutional power of the government; 2) if it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

**A. The governmental interest is unrelated to suppression of speech.**

The governmental interest supporting this regulation is unrelated to the suppression of free expression. Section 292.02 does not prohibit the communication of offensive or racist messages; it does not simply prohibit the burning of a cross. Section 292.02 does not prohibit Petitioner from burning a cross to convey an offensive message or a message of racial hatred. Rather, the ordinance prohibits Petitioner from burning a cross with the intent to threaten or intimidate targeted individuals on the basis of their race, color, creed, religion or gender. See *United States v. Lee*, 935 F.2d 952, 955 (8th Cir. 1991). This is comparable to forbidding an action which would prevent individuals from enjoying their federally guaranteed rights. See *Id.*

The ordinance is a content neutral speech restriction because it can be justified without reference to the content of the regulated speech. See *Boos v. Barry*, 485 U.S. 312, 320 (1988). The ordinance is aimed at prohibiting conduct which is equivalent to disorderly conduct in nature. The justification for the prohibition of this type of conduct is related to the secondary effects of that conduct. See *Id.* citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986). This ordinance would apply in similar situations where disorderly conduct could be charged. This ordinance leaves open numerous alternative channels of communication for people who want to espouse unpopular political and social views. A person could still distribute leaflets, picket or march on a public street, or communicate his message to the general public. However, there is no right for a person to intrude on private property to harass and intimidate a specific family. See *Frisby v. Schultz*, 487 U.S. 474, 486 (1988). Therefore, section 292.02 is a content neutral ordinance which prohibits a person



from causing fear or threatening or intimidating others on the basis of race, creed, color, religion or gender.

**B. The ordinance is within the constitutional power of the government.**

Section 292.02 is intended to protect individuals from being intimidated or terrorized on the basis of their race and religion. It is also intended to discourage further racial, religious and gender bias within the community. The enactment of this ordinance is a valid police power action necessary to further the safety and order of society. It is also a valid governmental attempt to further secure rights of citizens as guaranteed under the Fourteenth Amendment and other civil rights laws enacted by Congress and the State of Minnesota. See *Lee*, 935 F.2d at 955.

Moreover, this ordinance is intended to prohibit disorderly conduct within the community. The control of disorderly conduct has always been within the authority of police power; and is one of the most frequently charged crimes in major urban areas throughout the United States. Even though the St. Paul City Council made a political or social statement in passing this particular ordinance, that does not invalidate the government's authority to prohibit disorderly conduct. It is within the government's power to make a statement as to what goals it believes society should pursue. This is true regardless of whether the city council supports anti-discrimination legislation, implements liquor control laws, or enacts a bias-motivated disorderly conduct ordinance.

**C. The ordinance furthers a substantial governmental interest.**

The City's interests that are unrelated to expression are significant and numerous. The City has a strong interest in protecting the safety of its citizens. The City has an important and substantial, if not compelling, governmental interest in protecting citizens from fear and intimidation and imminent lawless conduct done on the basis of race or religion. Additionally, for the last half of the century, government at every level has found it to be a compelling state interest to enact regulations aimed at eliminating racial, religious, and gender discrimination in housing, education, business and nearly every aspect of societal life. This is precisely the same compelling governmental interest which the St. Paul ordinance is intended to further. The ordinance advances the state's interest in providing an environment where persons of all beliefs, persuasions, colors and origins may live undisturbed.

The ordinance prevents only conduct which itself inflicts injury or is likely to incite imminent lawless action; conduct equivalent to breach of the peace, terroristic threat, and assault which are permissibly prohibited. The ordinance protects its citizens from a type of confrontation that is inherently dangerous to both the perpetrator and the victim. This is a substantial governmental interest because of the nature of the crime and its unique harm to the individual victims, as well as to society's interest in eliminating racial discrimination.

The State's primary interest is in preventing breaches of the peace and provocation of violence and riot. Unlike the flag burning cases where only the general public may be offended by the message conveyed, the historic significance in the United States of burning a cross on a black family's property conveys a direct threat and provocation of violence that makes such acts tantamount to "fighting words" and threatens "imminent lawless action"; thus



taking the expression outside the First Amendment's protections.

Harassing an individual by using well known biased-based symbols and characterizations may be tantamount to intimidation by threat of physical violence. Cross burning is not always mere advocacy, but rather may be an overt act of intimidation which, because of its historical context, is often considered a precursor to or a promise of violence against black people. Cross burning in a black family's yard is an especially intrusive act which invades the substantial privacy interests of its victims in an essentially intolerable manner. To protect the inhabitants of this nation from such an attack on civil rights, does not violate the spirit of the First Amendment.

Additionally, the interest in residential privacy is clearly implicated in this legislation as applied to protect the right to be free from racial and religious harassment at a person's home. See *Lee*, 935 F.2d at 956; Cf. *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) ("There simply is no right to force speech into the home of an unwilling listener."). A person may not target an individual with the intent to threaten or intimidate that individual so as to interfere with the individual's right to privacy in the home. *Frisby*, 487 U.S. at 486. The individual would be trapped within the home and have no means of avoiding the unwanted speech. *Id.* at 487. The ordinance thus prohibits a person from having a "captive" audience for his objectionable speech.

The Minnesota state legislature has also recognized the substantial interest in preventing bias-motivated crime by enhancing the penalty for numerous acts done on the basis of bias motivation. See Minn. Stat. § 609.2231, subd. 4 (1990) (assault); Minn. Stat. § 609.595, subd. 1a (1990) (criminal damage to property); Minn. Stat. § 609.605, subd. 3 (1990) (trespass); and Minn. Stat. § 609.746, subd. 3 (1990) (interference with privacy).

The City of St. Paul recognized the important governmental interest in preventing bias-motivated crime by enacting this specific disorderly conduct law, rather than enacting a disorderly conduct law similar to state statute. See Minn. Stat. § 609.72 (1990).

**D. The ordinance has no greater restriction on First Amendment freedom than is essential to further the state's interest; the ordinance prohibits only conduct which is not constitutionally protected activity.**

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those by which their very utterance inflict injury or tend to incite to an immediate breach of the peace." *Beauharnais v. Illinois*, 343 U.S. 250, 255-256 (1952) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

The incidental restriction on First Amendment freedom in this case is no greater than that which is essential to further the governmental interest. Section 292.02 is a narrowly tailored law which targets and eliminates the exact source of "evil" it seeks to remedy by requiring some knowledge of committing a harmful act. *See Lee*, 935 F.2d at 955. The ordinance is violated only if it is proven beyond a reasonable doubt that the defendant possessed knowledge or had reason to know that his actions would "arouse anger, alarm or resentment~~ in~~ others on the basis of race, color, creed, religion or gender. See *Lee*, 935 F.2d at 955. If required knowledge is absent in the actor, the ordinance is not violated and there is no restriction on First Amendment activity.

An ordinance which prohibits fighting words and imminent lawless conduct does not reach a substantial amount of constitutionally protected conduct. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). Intimidation by threats of physical violence is not protected by the First Amendment. See, e.g., *Watts v. United States*, 394 U.S. 705, 707 (1969) (true threats are not constitutionally protected speech); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir.1990) ("A 'true' threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the First Amendment."); *United States v. Mitchell*, 463 F.2d 187, 191 (8th Cir.1972) (violent threats are devoid of constitutional protection), *cert. denied*, 410 U.S. 969 (1973). However, physical violence does not mark the constitutional line beyond which government may not legislate. Although persons must generally tolerate highly offensive and disturbing speech, the government may restrict such speech where it intrudes on the privacy of the home or where the degree of captivity makes it impractical for an unwilling listener or viewer to avoid exposure to the speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-11 (1975).

The present case is distinguishable from other cases where the limitations on speech were found to be unconstitutional. The conduct in this case occurred on private property, was directed at the individuals living there, and was reasonably likely to threaten, intimidate, harass or terrorize such individuals or to provoke a violent response. This is in contrast to *Texas v. Johnson*, 491 U.S. 397, 409 (1989) where this court concluded that no reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. *Accord Cohen v. California*, 403 U.S. 15, 20 (1971) (where convicted person publicly displayed provocative political statement

on the back of his jacket, "no individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult"). Both *Johnson* and *Cohen* involved political speech in a public place that was not directed at a specific individual. This type of conduct is not present in this case.

The Nazi march cases are also not similar to the present case. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. den.*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978). Again, these activities occurred on public property and were not aimed at any specific individual. Additionally, there was forewarning of the potentially offensive conduct so that a person could avoid confrontation with the offending march and police could prepare for public safety while still permitting the speech to occur.

St. Paul's ordinance does not ban the burning of crosses, or the making of swastikas, or any other symbol. The ordinance does not ban the display of any symbol. Rather, when read correctly, this ordinance creates only a prohibition of the crime of placing one in reasonable apprehension of his or her personal safety due to threatening conduct made with regard to the victim's race, color, creed, religion, or gender. This crime is a normal legislative extension of common law assault, necessary to meet a need in our society. That need is to protect those who are being threatened by aggressors who use symbols of organized murder to terrorize the victim when those symbols are used specifically because the perpetrator knows of the sensitivity of the victim to that symbol.

Thus, the St. Paul ordinance may properly be interpreted to apply only to conduct which is unprotected under the First Amendment. When one examines the context in which Petitioner's



act occurred, it is clear that such conduct may be punished without abridging Petitioner's First Amendment rights. If Petitioner wished to convey a generalized message and provoke thought and discussion, he could have engaged in the same conduct on his own property without threatening the property or safety of another unconsenting, unwilling participant. If Petitioner wished to engage in political speech or to express his distaste and dislike for people of other races, origins, or beliefs, he could have done so in a context in which his ideas and conduct, however abhorrent, were not immediately threatening or endangering. Because alternative avenues of communication were available, the ordinance does not abridge Petitioner's freedom of speech.

In the present matter, Petitioner directly insulted and intimidated innocent persons, endangered those persons' property, and conveyed an immediate threat of bodily harm. The victims in this case may well have been afraid to go outside their home, even to extinguish the unlawful fire on their property, for fear of being physically attacked. Recent American history demonstrates that racial hatred has resulted in murders of blacks in their own yards or in other areas where people should feel "safe." Cross burnings themselves have long been associated with lynchings and other racially-motivated violence. This is precisely the result St. Paul Ordinance Section 292.02 was intended to prevent.

The instant case is distinguishable from *Johnson*, *Cohen*, and *Collin*, where the defendants were merely expressing controversial political opinions to society at large. In contrast, a cross burning on another's property is highly likely to be taken not only as direct personal insult, but as an immediate threat to that person's safety. In addition, unlike the situation in *Johnson*, *Cohen*, and *Collin*, where any offended persons could avert their eyes or leave the scene, the victims in this case were prisoners in their own

home, unable to avoid or ignore the burning cross. They were captives in what is normally a sanctuary, forced to watch this prelude to violence, afraid to extinguish the fire, or to resist. Selective time, place and manner restrictions have been upheld when the speaker intrudes on the privacy of the home, *Rowan v. Post Office Department*, 397 U.S. 728 (1970), or where it is impractical for a captive audience to avoid exposure. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Thus, under the *O'Brien* test, the ordinance is a valid regulation of conduct because it is intended to further substantial and important governmental interests.



## CONCLUSION

St. Paul Ordinance Section 292.02 is constitutional, both facially and as applied. The ordinance has been narrowly construed by the Minnesota Supreme Court to proscribe only conduct which is not protected by the First Amendment. Amici Curiae, City of Minneapolis, City of St. Paul, and the League of Minnesota Cities support such an interpretation. For the aforementioned reasons, we respectfully request that the opinion of the Minnesota Supreme Court be affirmed and that St. Paul Ordinance Section 292.02 be declared constitutional as proscribing conduct which itself injuries or tends to incite immediate violence, or which is directed, and is likely, to produce imminent lawless action.

Respectfully submitted,

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